Supreme Court, U.S.
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(2)

No. 94-188

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MARY C. MILLER, Administratrix of the Estate of JOHN R. MILLER, Deceased, and all others similarly situated,

Petitioners,

v.

KEYSTONE INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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August 26, 1994

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QUESTIONS PRESENTED

1. Whether petitioner failed to raise any federal question in the state court proceedings below?

2. Whether this Court lacks jurisdiction to review a decision of a state court on a matter of state law where the only federal question alleged is that the decision overruled a prior state court precedent in violation of the doctrine of *stare decisis*?

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No. 94-188

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MARY C. MILLER, Administratrix of the Estate of JOHN R. MILLER, Deceased, and all others similarly situated,

Petitioners,

v.

KEYSTONE INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

OPINION BELOW

The decision of the Pennsylvania Supreme Court in this case is reported at 535 Pa. 531, 636 A.2d 1109 (1994).

STATEMENT OF JURISDICTION

This Court does not have jurisdiction over this case pursuant to 28 U.S.C. §1257(a), or any other statute or rule. The reasons why this is so are set forth, *infra.*

STATEMENT OF THE CASE

This is an action, styled as a class action, for insurance benefits under the Pennsylvania No-Fault Motor Vehicle Insurance Act, 40 P.S. §1009.101, *et seq.* (repealed, Act of February 12, 1984, P.L. 26, No. 11, §8(a) ("No-Fault Act").)

Petitioner Mary C. Miller brought suit in state court on August 11, 1986 in her capacity as the administratrix of the estate of John R. Miller. John Miller, an insured of respondent Keystone Insurance Company ("Keystone")[1], had died in an automobile accident six years before, on August 12, 1980.

Following the accident in 1980, Keystone had promptly paid a variety of insurance benefits pursuant to John R. Miller's insurance policy. Keystone paid $1,500 in funeral benefits on September 15, 1980, $5,652.97 in collision coverage benefits on October 1, 1980, and $5,000 in survivor's loss benefits over a period of time ending on April 30, 1982. Petitioner did not request Keystone to pay work loss benefits[2] to the estate and Keystone did not pay

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[1] Keystone is a wholly owned subsidiary of AAA Mid-Atlantic Inc. and has two subsidiaries: Keystone Insurance Company of New Jersey, and Keystone State Life Insurance Company.

[2] The No-Fault Act provided for work loss benefits in an amount not to exceed $15,000, to be paid to an accident victim for lost income resulting from the accident. 40 P.S. §1009.-202(b). Work loss benefits were determined to be payable for income loss arising after death. *Allstate Insurance Co. v. Heff-*

[footnote continued]

any such benefits. (A. 5a.)[3]

In the trial court, Keystone moved for summary judgment based on the statute of limitations. Under the No-Fault Act, an action for work loss benefits was untimely unless filed within four years of the accident or within two years from the last payment of benefits. 40 P.S. §1009.106(c)(1).

In opposition to Keystone' summary judgment motion, petitioner did not present any testimonial evidence, in the form of affidavit or otherwise. The sole evidence submitted by petitioner in opposition to the motion consisted of two documents from Keystone's files. One was a chart listing the various payments made on the claim. (R.A. 3a.)[4] The other was a letter from an independent claims adjuster to a Keystone claims representative. (R.A. 1a.) (*See* A. 5a-6a.)

The trial court granted summary judgment in favor of Keystone and against petitioner based on the statute of limitations. (A. 57a.)

On appeal to the Superior Court of Pennsylvania, an intermediate appellate court, petitioner contended (for the first time) that the statute of limitations had been tolled because Keystone had breached an alleged duty of good faith and fair dealing that it owed to her. The alleged breach consisted of Keystone's failure to advise petitioner that she had a potential cause of action against

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ner, 491 Pa. 447, 421 A.2d 629 (1980). This kind of post-death work loss benefit has been termed "post-mortem work loss benefits."

[3]The Appendix appended to the Petition for Writ of Certiorari will be cited as "A."

[4]Respondent's Appendix is appended hereto and will be cited as "R.A."

Keystone for post-mortem work loss benefits. At the time that Keystone was interacting with petitioner, no Pennsylvania appellate court had yet recognized a right of estates of deceased victims to post-mortem work loss benefits. Such a right was eventually established in Pennsylvania on December 30, 1983, when the Pennsylvania Supreme Court decided *Freeze v. Donegal Mutual Insurance Company*, 504 Pa. 218, 470 A.2d 958 (1983). (*See* A. 13a n.10.)

The Superior Court reversed the summary judgment in favor of Keystone and remanded for further proceedings. (A. 20a.) The Superior Court ruled that an insurer under the No-Fault Act had a duty to advise an unrepresented insured of potential claims that the insured might bring against the insurer. The Superior Court further implied that a failure to so advise an insured would toll the statute of limitations. This was a novel ruling in Pennsylvania law, which the Superior Court based on the prior Supreme Court of Pennsylvania decision in *Dercoli v. Pennsylvania National Mutual Insurance Co.*, 520 Pa. 471, 554 A.2d 906 (1989).

On appeal to the Pennsylvania Supreme Court, the Superior Court's decision was reversed and the summary judgment in favor of Keystone was reinstated. The Supreme Court held that petitioner's claim was barred by the No-Fault Act's statute of limitations. In the Supreme Court's words, the Superior Court had "misinterpreted this Court's holding in *Dercoli* and applied it to a situation which is factually distinguishable." (A. 4a.)

SUMMARY OF ARGUMENT

Petitioner failed to raise any federal questions in the state court proceedings, and on this basis alone, the petition should be denied.

Petitioner has failed to identify a federal question in her petition and this Court accordingly lacks jurisdiction over this case. The issue identified by petitioner – whether the Pennsylvania Supreme Court's decision below overruled one of its prior decisions without due regard for *stare decisis* – does not raise an issue of federal law. *Stare decisis* is not a constitutional doctrine, and numerous cases of this Court hold that no jurisdiction exists to review state court decisions on the ground that they overrule prior state court precedent.

In any event, the Pennsylvania Supreme Court did not overrule any precedents. On the contrary, the Court was careful to distinguish the case relied upon by petitioner, and to show the consistency of its decision with various other prior opinions.

Petitioner's statement of facts contains several allegations that are not true and not supported by record evidence.

ARGUMENT

I.

PETITIONER FAILED TO RAISE ANY FEDERAL ISSUE IN THE STATE COURTS.

"It is well-settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' " *Board of Directors of Rotary Inter-*

national v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987), *quoting Webb v. Webb,* 451 U.S. 493, 496-97 (1981). Here, petitioner never raised below the federal issue which she now urges this Court to decide. Accordingly, the petition for writ of certiorari must be denied.[5]

The petition identifies as the sole federal question the issue whether the Supreme Court of Pennsylvania's decision violated the "Rule of Law and *stare decisis*" by overturning "years of precedent" (Petition at i), a question which the petition treats as going to the "constitutionality" of the state court's conduct. (*Id.* at 2.) Assuming for the moment that the decision below overturned precedent, and that overturning a state law precedent could conceivably rise to the level of a violation of the United States Constitution, the petition would nonetheless fail because no federal constitutional issue was ever argued or presented to the state courts.

Petitioner filed an Application for Reargument with the Pennsylvania Supreme Court following the decision of which she complains. (R.A. 4a.) In that Application, petitioner did assert the argument that the Pennsylvania Supreme Court's decision violated *stare decisis.* However, petitioner never identified the United States Constitution as a source of law that had been violated, and did not cite a single federal case in her Application. Rather, the entire reargument petition was cast in terms of state law. Given these facts, petitioner failed to pre-

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[5] In violation of Rule 14(h) of the Rules of the Supreme Court, petitioner has failed to identify where in the state court proceedings she raised the alleged federal question that is the subject of her petition.

serve the alleged federal constitutional issue for this Court's review. *Bankers Life and Casualty Co. v. Crenshaw,* 486 U.S. 71, 79-80 (1988); *Board of Directors of Rotary International, supra,* 481 U.S. at 550 & n.9.

II.

THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE PENNSYLVANIA SUPREME COURT, SINCE PETITIONER HAS FAILED TO IDENTIFY A FEDERAL QUESTION.

This Court has certiorari jurisdiction to review state court decisions only where a federal question is involved. 28 U.S.C. §1257(a). In this case, no jurisdiction exists, since the only federal question identified by petitioner – whether the Pennsylvania Supreme Court failed to observe *stare decisis* – does not raise a federal question.

The fundamental problem with petitioner's attempt to invoke this Court's certiorari jurisdiction is her inability to show that a state court's departure from *stare decisis* on a matter of state law constitutes a violation of the United States Constitution.

This Court has repeatedly held that no constitutional violation occurs when a state court overrules a prior precedent. *See, e.g., Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364, 366 (1932); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 680-81 (1930); *Willoughby v. City of Chicago,* 235 U.S. 45, 50 (1914); *Patterson v. Colorado,* 205 U.S. 454, 460-61 (1907); *Central Land Company of West Virginia v. Laidley,* 159 U.S. 103, 112 (1895). As Justice Brandeis explained: "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not

give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." *Brinkerhoff-Faris Trust & Savings Co., supra,* 281 U.S. at 680 (footnote omitted).[6] "State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties . . . ." *Id.*, 281 U.S. at 682 n.8.

In the words of Justice Holmes: "There is no constitutional right to have all general propositions of law once adopted remain unchanged." *Patterson, supra,* 205 U.S. at 461. "[I]n general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed." *Id.*

In short, this Court is "not at liberty, for anything contained in the Constitution of the United States, to thrust upon [state] courts a different conception either of the binding force of precedent or of the meaning of the judicial process." *Great Northern Ry. Co., supra,* 287 U.S. at 366 (Cardozo, J.).

The petition for writ of certiorari is accordingly doomed for failure to raise a federal question. *Stare decisis* is not a federal constitutional doctrine that constrains the decisions of state courts on matters of state law. Even assuming that the Pennsylvania Supreme

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[6] Petitioner, it should be noted, does not contend that she relied to any extent on the 1989 *Dercoli* decision, nor could she. Petitioner commenced this litigation in 1986, based on events that occurred in 1980-82. *Dercoli* was not decided until 1989. Petitioner did not contend that Keystone had breached its so-called duty of good faith and fair dealing until this case was pending on appeal from the trial court's grant of summary judgment, after *Dercoli* was decided.

Court "violated" *stare decisis* by overruling a prior decision, no federal question reviewable by this Court would be presented. And, in the absence of a federal question, this Court lacks jurisdiction to review the final decision of a state court. *Brinkerhoff-Faris Trust & Savings Co., supra,* 281 U.S. at 680.[7]

III.
THE PENNSYLVANIA SUPREME COURT'S DECISION WAS CONSISTENT WITH *STARE DECISIS.*

As shown above, petitioner did not raise her purported federal issue in the state courts, and the issue does not present a federal question in any event. However, even if it were assumed that petitioner could overcome these hurdles, her petition would have to be denied because her premise is false – the Pennsylvania Supreme Court in this case did not overrule its prior decision in *Dercoli.*

In *Dercoli,* the plaintiff sued two automobile insurers for damages for breach of an alleged duty of good faith and fair dealing. In her complaint, Mrs. Dercoli alleged that she had been severely injured in an automobile accident in which her late husband had been at fault. She further alleged that the insurer defendants had told her that she did not need to retain counsel, and that they would ensure that she received everything to which she was entitled. (A. 8a.)

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[7] Petitioner complains that the three justices who dissented in *Dercoli* in 1989 comprised a majority in this case, decided five years later. However, nothing in the United States Constitution prescribes the minimum number of judges for valid state court decisions. And, as noted in the text, there is no constitutional impediment to a state court reversing its direction.

While the insurers were adjusting Mrs. Dercoli's claims, the defense of interspousal immunity was abolished by the Pennsylvania Supreme Court. This meant that Mrs. Dercoli had a viable tort claim for negligence against her late husband's estate which was unquestionably covered by the insurance policies' liability coverage. Notwithstanding this fact, the insurers did not advise Mrs. Dercoli of the potential tort claim or of the fact that the claim was clearly covered by the policies. (*Id.*)

On appeal to the Pennsylvania Supreme Court, the *Dercoli* case elicited three separate opinions. Four justices voted in favor of the plaintiff, deciding that her complaint was sufficient to withstand the state procedural equivalent of a motion to dismiss for failure to state a claim. Three justices dissented. In a concurring opinion that commanded the allegiance of two justices of the four-justice majority, Justice Papadakos emphasized that the insurers had "knowingly and purposefully talked the widow out of seeking independent legal counsel" and had therefore "voluntarily placed themselves in the position of protecting the widow and obtaining for her all benefits that were reasonably due under the facts and state of law known to the insurers." *Dercoli, supra,* 520 Pa. at 482, 554 A.2d at 911. Justice Papadakos stressed that the Court's decision would not impose an affirmative duty on insurers: "On the contrary," he stated, "in this case the insurers themselves voluntarily transformed themselves into legal advisors to the widow." *Id.*

In the present case, the Pennsylvania Supreme Court did not overrule its prior decision in *Dercoli.* On the contrary, the Court made a "determination that [*Dercoli*] is not applicable to the instant case." (A. 4a.) The Supreme Court agreed with Keystone that the

Superior Court had "misinterpreted this Court's holding in *Dercoli* and applied it to a situation which is factually distinguishable." (*Id.*)

Specifically, the Pennsylvania Supreme Court held that the Superior Court was mistaken in thinking that *Dercoli* "impose[d] an affirmative duty upon an insurer to advise and inform an insured of all potential claims when the insurer assumes the responsibility for processing the claim." (A. 7a.) The Court characterized what the Superior Court had done as "erroneously interpret[ing] and impermissibly expand[ing] our limited holding in *Dercoli* beyond its natural bounds . . . ." *Id.*

The Supreme Court in this case not only declined to overrule *Dercoli,* it relied on *stare decisis* and several prior precedents in reaching its decision to reinstate the judgment in favor of Keystone. The Court cited favorably its "factually similar" decision in *Taglianetti v. Workmen's Compensation Appeal Board,* 503 Pa. 270, 469 A.2d 548 (1983). (A. 9a.) In that case, the Court had declined "in the absence of evidence of fraud, intentional deception, or the making of misleading statements," to impose an "affirmative duty to apprise a compensation claimant of any or all available benefits." (A. 10a.)

The Court also "reaffirmed [its] earlier rulings" in *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company,* 494 Pa. 501, 431 A.2d 966 (1981), and *Smith v. Harleysville Insurance Company,* 494 Pa. 515, 431 A.2d 974 (1981), "where [it] declined the opportunity to create a judicial remedy for bad faith conduct which occurs under the No-Fault Act." (A. 11a-12a.) In addition, the Court relied upon its prior decision in *Sachritz v. Pennsylvania National Mutual Casualty Insurance Co.,* 500 Pa. 167, 455 A.2d 101 (1982), for

the "fundamental and long-standing rule in Pennsylvania . . . that a lack of knowledge, mistake or misunderstanding does not operate to toll the statute of limitations." (A. 12a.)

In short, far from discarding the rule of *stare decisis*, as petitioner alleges, the Pennsylvania Supreme Court in this case was careful to show that its decision was consistent with its prior precedents. The Court did not overrule *Dercoli*, but simply distinguished it. Thus, even if *stare decisis* were a federal doctrine on the basis of which this Court could review state court decisions in purely state law matters – which it is not – the petition for writ of certiorari should not be granted in this case. The doctrine of *stare decisis* was properly applied in the proceedings below.

IV.

THE PETITION FOR WRIT OF CERTIORARI MISSTATES THE RECORD.

The factual assertions contained in the Petition for Writ of Certiorari are nearly all incorrect and not supported by record evidence. Although respondent does not believe that these misstatements of the record are material, respondent is nonetheless obliged to point them out.

It is not true and there is no record evidence that Keystone made an open-ended promise "to pay the no-fault benefits to which [the Millers] were entitled." (Petition at 8.) Keystone's "promises" to John Miller were set forth in their entirety in the insurance policy Keystone issued to him. The policy was never introduced into the record by petitioner.

It is not true and there is no record evidence that petitioner "was determined to be a dependent sur-

vivor," if what is meant by that is a judicial determination. While it is true that Keystone treated petitioner in her individual capacity as a dependent survivor, and paid her $5,000 in survivor's loss benefits, the issue of petitioner's status as a dependent survivor was never litigated. Moreover, the state courts determined that petitioner instituted this action solely in her capacity as the administratrix of her son's estate, and not in her capacity as her son's survivor. (A. 25a-26a, n.2.)

It is not true and there is no record evidence that petitioner "filed a claim form that said Keystone would pay the no-fault benefits to which she was entitled." (Petition at 8.) The claim form filed by petitioner was never submitted into evidence.

Finally, it is not true and there is no record evidence for petitioner's statement that "Keystone chose as its corporate policy *not* to pay [work loss benefits] unless specifically requested and *not* to tell insureds of their entitlement." (Petition at 8 (emphasis in original).) Moreover, at the time Keystone was interacting with petitioner, between August, 1980 and April, 1982, no published Pennsylvania appellate decision had held that estates were entitled to post-mortem work loss benefits. (A. 13a, n.10.)

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

ARTHUR REEHER COMPANY, INC.

Executive Offices
5721 JONESTOWN ROAD
P.O. Box 6215, HARRISBURG, PA 17112
PHONE (717) 545-3726

Please Reply To:
ARTHUR REEHER CO.
P.O. BOX 385
YORK, PA 17405

Your Claim No.	Unknown
Our File No.	02-ACI-7649
Policy No.	48105455
Assured	Miller, John R.
Claimant	Danner, Donald K.
D/L	8-12-80
Type of Loss	Double Fatality

Date: 10-21-80

TO: Keystone Insurance Company
1401 West Mt. Royal Avenue
Baltimore, MD 21201

ATTN: MR. SAL LIBERTO,
CLAIMS MANAGER

Dear Mr. Liberto:

This will supplement our previous report dated 10-10-80 and acknowlege our Harrisburg Branch cc of 10-16-80, and our phone conversation of 10-20-80 along with serving as our closing report.

As you have indicated in our telephone conversation of 10-20-80 that Mary Miller (mother of the deceased insured) would be entitled to survivors benefits which according to your Philadelphia office would involve a monthly check of $135.00 until the $5,000 survivors benefit is exhausted we have notified Mrs. Miller that she will be receiving monthly payments shortly in that regard. In addition, we made no mention to Mrs. Miller as discussed pertaining to possible benefits for lost wages and will merely await developments in that regard.

In light of the above, our activity in the York area would now appear to be complete while our Harrisburg Branch follows further in their investigation and handling. Thereofre, we are taking the liberty of retirring out file and submitting our service invoice for your consideration.

We again thank-you for allowing us to be of service, and of course will retain this file in the event that we can be of any further service in this area.

Very truly yours,

ARTHUR REEHER COMPANY

/s/ Joseph C. Kozlowski
Joseph C. Kozlowski
Adjuster

CONFIDENTIAL
John R. Miller, Dec.
Exhibit # 1

Enclosure: 1. One service invoice

cc: Harrisburg Branch Arthur Reeher Company
Your File #: 01-AP-14376
ATTN: MR. PAUL R. GREEN

RECORD OF P.I.P. PAYMENTS

Claim #_____Case # _____ Victim's Name _____ Date of Acc. _____

MEDICAL		WAGES		ESSENTIAL REPLACEMENT SERVICES		PAYEE WAGE PERIOD
PAID	RESERVE	PAID	RESERVE	PAID	RESERVE	
XXXX	250	XXXX		XXXX	6500	
				1500	5000	Funeral Ex.
10-20-80				270	4730	Ins.
12-2-80				540	4190	Ins.
1-21-81				540	3650	"
				540	3110	Ins.
5-20-81				540	2570	"
7-30-81				540	2030	"
9-23-81				540	1490	"
11-24-81				540	950	"
1-31-82				540	410	"
4-30-82				410	000	

CONFIDENTIAL
John R. Miller, Dec.
Exhibit # 2

APPENDIX B

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 84 M.D. APPEAL DOCKET, 1991
J-172-1992)

MARY C. MILLER, Administratrix of the
Estate of JOHN R. MILLER, Deceased
and all others similarly situated,

Appellees,

v.

KEYSTONE INSURANCE COMPANY,

Appellant

APPELLEES' APPLICATION FOR REARGUMENT

Appeal from the Judgment entered January 8, 1991,
by the Superior Court of Pennsylvania, No. 00304
NBG 1989, Vacating the Judgment dated June 2, 1989,
by the Court of Common Pleas of Dauphin County,
Pennsylvania in No. 26 S 1987, and Remanding
for Further Proceedings

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(717) 238-6791

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B. Despite Justice Flaherty's statement in his *Dercoli* dissent, insurance companies have always had a fiduciary duty to their insured. 3

C. The legislature, by passing the Pennsylvania No-Fault Act, mandated that insurance carriers assume a fiduciary responsibility to their insureds and pay them all benefits to which they are entitled 5

D. The *Dercoli* Minority/present Majority misapprehended the facts and law in their holding that Mrs. Miller, from 1980 through 1984, had only a *potential* right to obtain work loss benefits 8

E. The three-justice Majority in the instant case misapprehended the legal distinction between the duty owed by a third party carrier or one's employer and the duty that an insurer owes to its own insured 11

F. The holding in this case not only is contrary to Your Court's prior holdings as to first party insurance law, but also will have far-reaching application in many other insurance cases with catastrophic results. 13

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I. [1]

3-2 SUPREME COURT DECISION.

The Order of Superior Court vacating the Order of the trial court is reversed and the Order of the Court of Common Pleas for Dauphin County granting Appellant's motion for Summary Judgment on June 2, 1989, is reinstated.

Mr. Justice Larsen *did not participate* in the consideration or decision of this case.

Mr. Justice McDermott *did not participate* in the decision of this case.

Mr. Justice Cappy files a Dissenting Opinion in which Mr. Justice Papadakos joins.

DATED: JANUARY 31, 1994
JUDGMENT ENTERED:

/s/ Shirley Bailey
CHIEF CLERK

(Emphasis supplied)

A copy of your Court's Opinion dated January 31, 1994, is attached as Exhibit "A".

A copy of the Superior Court's decision dated January 8, 1991, reported at 402 Pa. Super. 213, 586 A.2d 936 (1991) is attached as Exhibit "B"; the trial court's Opinion and Order dated June 2, 1989, is attached as Exhibit "C".

A copy of *Dercoli v. Pennsylvania Nat. Mut. Ins. Co.*, 520 Pa. 471, 554 A.2d 906 (1989) is attached as Exhibit "D" and the Superior Court's decision in *Banker v. Valley Forge Ins. Co.*, 401 Pa. Super. 367, 585 A.2d 504 (1991), *alloc. denied* 529 Pa. 615, 600 A.2d 532 (1991) is attached as Exhibit "E".

II. [2]

POINTS OF LAW OR FACE OVERLOOKED OR MISAPPREHDED BY A THREE PERSON MAJORITY OF YOUR COURT.

A. Principle of Stare Decisis.

Less than four years ago, a Majority of Your Court consisting of Justices McDermott, Papadakos, Larson and Stout held in *Dercoli v. Pennsylvania Nat. Mut. Ins. Co.*, 520 Pa. 471, 554 A.2d 906 (1989) that a first party carrier, the insured's own carrier, is liable when it fails to "deal with the [insured] on a fair and frank basis, and at all times, to act in good faith." According to the Majority in *Dercoli,* the insurer failed in its "duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies along with all requirements, including any time limitations for making a claim." *Dercoli,* 554 A.2d at 909. *Also see,* Justice Papadakos, concurring opinion, 554 A.2d at 911 in which Justice McDermott joined.

Justice *Flaherty* dissented:

> I dissent. *Until today* an insurance company on the facts pleaded in this case has had no *fiduciary* duty to an insured, *even when it advised its insured that he does not need a lawyer.* But if, under the *guise of "fair dealing and good faith,"* we are *now* to decide that insurance companies have *a fiduciary duty* to advise of *every possible claim,* surely insurance companies will cease even to talk to claimants for fear of breaching this new judicially declared duty.
>
> * * *

As much as we all would like to see unfortunate victims of automobile accidents compensated fully,

> *such compensation cannot be achieved at the cost of dismantling the insurance industry. It has always been the case that insurance companies, insureds and claimants are potential adversaries.* [3]

Dercoli, 554 A.2d at 911-912 (Emphasis supplied) (*Zappala,* J., joins in this Dissenting Opinion; *Nix,* C.J. separately dissented).

Less than four years later in the instant case, with Justice Larson and Justice McDermott not participating, *the Dercoli dissent of three has become a majority of three.* The legal principle of "stare decisis," the adherence to precedent, requires that the rule of law should not change so quickly merely because half of the Majority in *Dercoli* did not and/or could not participate in the instant case. Because of the importance of this issue for all insurance consumers in Pennsylvania, reargument should be granted so that the *full* court can decide the direction of insurance law in Pennsylvania.

B. Despite Justice Flaherty's statement in his *Dercoli* dissent, insurance companies have always had a fiduciary duty to their insured.

Long before the legislative mandates established in the No-Fault Act and accompanying Insurance Department Regulations, Your Court consistently recognized an insurer's important duty of fair dealing toward an insured. Your Court, more than half a century ago, declared in *Fedas v. Ins. Co. of the State of Penna.,* 300 Pa. 555, 151 A. 285 (1930):

> The utmost fair dealing should characterize the transactions between an insurance company and the insured. If the insurer, having knowledge of a loss, by any act throws the insured off his guard as to the necessity of performing some duty enjoined by

> the policy, the insurer should not be permitted to take advantage of the failure to act. [4]

Fedas, 300 Pa. at 559.

The duty of "utmost fair dealing" was repeatedly expressed by Your Court in cases which followed *Fedas. See, Cowden v. Aetna Casualty and Surety Co.,* 389 Pa. 459, 470, 134 A.2d 223 (1957) ("the insurer must accord the interest of its insured the same faithful consideration it gives its own interest"); *Gideon v. State Farm Mut. Auto. Ins. Co.,* 410 Pa. 55, 59, 188 A.2d 320 (1963) ("the insurer assumes a fiduciary position towards the insured and becomes obligated to act in good faith and with due care in representing the interests of the insured"); *Gray v. Nationwide Mut. Ins. Co.,* 422 Pa. 500, 504, 223 A.2d 8 (1966) ("the insurer assumes a fiduciary position towards the insured and becomes obligated to act in good faith and with due care in representing the interests of the insured"); *Dercoli v. Pennsylvania National Mut. Ins. Co.,* 520 Pa. 471, 554 A.2d 906, 909 (1989) (it has long been recognized that "the utmost fair dealing should characterize the transactions between an insurance company and the insured").

The decision of the three-justice Majority in the instant action vitiates the long years of precedent set forth above by requiring that the insurer make "knowing and purposeful misrepresentations" and undertake to act "as the insured's counsel" before any breach of duty occurs. *See,* Slip Opinion, p. 7 (attached as Exhibit "A").

C. The legislature, by passing the Pennsylvania No-Fault Act, mandated that insurance carriers assume a fiduciary responsibility to their insureds and pay them all benefits to which they are entitled. [5]

A basic tenet of statutory construction is that judges and justices must put aside their own philosphies and follow the public policy of the community as expressed in the constitution, legislation, and established precedent. Judges and justices may have the power when they cease to be a minority and become a majority, but they do not have the right to ignore legislative intent and public policy expressed in properly-passed statutes. The Statutory Construction Act, 1 Pa. C.S.A. §1901, *et seq.*, demands that courts seek out and follow the legislative intent in all statutory construction.

The particular statute involved in this case is the now-repealed No-Fault Motor Vehicle Insurance Act, 40 P.S. §1009.101, *et seq.* The expressed Findings and Purposes included:

> (a) Findings–
>
> * * *
>
> (3) the maximum feasible restoration of all individuals injured and compensation of the economic losses of the survivors of all individuals killed. . . .
>
> * * *
>
> (5) exhaustive studies . . . have determined that the present basic system of motor vehicle accident and insurance law . . . is not such a low-cost, comprehensive, and fair system;
>
> (6) careful studies . . . have demonstrated that a basic system . . . which:

> (A) assumes every victim payment of all his basic medical and rehabilitation costs, and recovery of a reasonable amount of work loss . . . is such a low-cost . . . system; [6]
>
> * * *
>
> (b) Purpose. – Therefore, it is hereby declared to be the policy of the General Assembly to establish . . . a Statewide system of prompt and adequate basic loss benefits for motor vehicle accident victims and the survivors of deceased victims.

40 F.S. §1009.102.

The innovative insurance scheme contemplated by the legislature and enacted in 1974 *envisioned a system whereby an insured and his insurer were partners, not adversaries.*

Following the passage of the No-Fault Act, the Pennsylvania Insurance Department, by regulation, mandated that all insurance companies and their insureds the following notice:

> C. LAWSUITS.
>
> You will not need a lawyer to collect your No-Fault benefits. If you are injured, [contact your insurance company or your insurance agent] to get claims forms. You should be paid within 30 days after the company receives completed forms from all related parties (you, your employer, the hospital, etc.).

31 Pa. Code §66.4, Transition Procedures.

After an accident when the insured went to his insurer in person or by phone, he was given an application to complete that stated at the top:

TO ENABLE *US TO DETERMINE IF YOU ARE ENTITLED TO BENEFITS* UNDER THE PERSONAL INJURY PROTECTION LAW, *PLEASE COMPLETE THIS FORM AND RETURN IT PROMPTLY.*

No-Fault Application, Exhibit "F" (Emphasis supplied).

The application that the insured completed unequivocally stated that it was the responsibility of the insurance carrier – "*us* . . . to determine if *you* are entitled to benefits under the Personal Injury Protection Law." [7]

Although Justice Flaherty in his *Dercoli* dissent references the mandated notice that insureds *will not need to consult lawyers,* he goes on to answer that insureds should realize that they needed lawyers because insurance companies are their enemies. This may be Justice Flaherty's philosophy, but it certainly was not the legislative intent.

The No-Fault Act was designed to revolutionize the prior adversarial relationships between insurer and insured. No longer were claimant and company to be enemies. Instead, they were to be partners, with claimant providing basic information and insurer deciding the benefits due and paying them. Nor did the insured have to make a claim for each individual category of benefits he sought. The application asked for basic information, but it did not include any space where the insured had to denominate the benefits for which he was making a claim. That responsibility was on the insurer. In fact, Section 106(a)(5) affirmatively required that insurance carriers who were going to deny benefits to which the insureds might be entitled must "give to the claimant written notice of the rejection promptly, but in no event more than thirty days after the receipt of reasonable proof of the loss" 40 P.S. §1009.106(a)(5).

Further, the No-Fault Act incorporated penalty provisions, including counsel fees, 40 P.S. §1009.107, and interest, 40 P.S. §1009.106(a)(2), to sanction insurance carriers that did not perform their statutorily mandated duties. [8]

There is no question, therefore, that the *Dercoli* three-member Minority that is the present three-member Majority in this case *is clearly wrong in holding that an insurance carrier does not have an affirmative duty to pay benefits and inferentially advise its insured as to his or her right to such benefits.*

D. The *Dercoli* Minority/present Majority misapprehended the facts and law in their holding that Mrs. Miller, from 1980 through 1984, had only a *potential* right to obtain work loss benefits.

The federal studies, proposed federal act, other studies and various state experiments references in the No-Fault Act virtually all provided for "work loss" benefits to be paid to survivors of deceased victims. The Pennsylvania No-Fault Act defines "work loss" as "loss of gross income of victim"; "victim" includes all who sustain injuries including "deceased victim"; and "injury" includes death (*see,* Section 103, "Definitions").

The Superior Court in 1979, with one dissent, and Your Court unanimously on September 22, 1980, held in two consolidated cases that *survivors and estates* of deceased victims were entitled to "work loss" benefits. *Heffner v. Allstate Ins. Co.*, 265 Pa. Super. 181, 401 A.2d 1160 (1979), *aff'd,* 491 Pa. 447, 421 A.2d 629 (1980) and *Pontius v. U.S.F.&G.*, No. 2702 S 1977 (C.P. Dauph.), *reversed* by the Superior Court to No. 80 March Term, 1978 (unreported), *aff'd,* 491 Pa. 447, 421 A.2d 629 (1980).

In the instant case, Mrs. Miller lost her son. Keystone paid survivor's loss benefits to her based on her dependency on her son. There is, therefore, no question that when Mr. Miller applied for benefits and gave a statement to Keystone in October, 1980, *she was entitled, and the insurance company knew she was entitled, to "work loss" benefits.* [9]

Present counsel, anticipating that insurance carriers would not perform their legislatively mandated duty to inform and pay benefits, in 1979 commenced a class action entitled *Nye v. Erie Ins. Exchange,* No. 5349 S 1979 (C.P. Dauph.), 307 Pa. Super 464, 453 A.2d 677 (1982), 504 Pa. 3, 470 A.2d 98 (1983), which included 31 of the larger insurance companies in Pennsylvania *including Keystone Ins. Co.,* the Defendant in the instant case. Although successful before the Superior Court, Your Court held that *Nye* did not have standing to sue any carrier other than his own.

As counsel anticipated, the Defendant in this case followed a *policy of keeping secret* from its insureds *their right to $15,000 of work loss* and, obviously, not voluntarily paying same *See,* Confidential Memo referenced on page 3 of Majority Opinion (Exhibit "G") which states:

> "In addition, we made no mention to Mrs. Miller as discussed pertaining to possible benefits for lost wages and will merely await developments in that regard."

Although Keystone and the majority in this case reference *Freeze v. Donegal Mut. Ins. Co.,* 504 Pa. 218, 470 A.2d 959 (1983) for the proposition that the law was uncertain until *Freeze,* it is clear that the law *was unequivocal as to survivors and estates of deceased victims where there was dependency in 1980,* and *Freeze* merely [10]

confirmed that the law *also* applied to 11-year-old children who were not in the work force.

What Keystone did in the instant case amounts to fraud. Although Keystone entered into a contract with Mr. Miller to pay the benefits due, and although Mrs. Miller signed a claim form which had a heading that Keystone would determine and pay the benefits to which she was entitled, Keystone kept Mrs. Miller's money as it might have kept her money from an overpayment of premium or by failing to pay medical bills or funeral expenses. Do not insurance companies, like tellers at banks, clerks at department stores, and/or sellers of goods, have a legal duty to provide benefits, goods or services for money paid? Does the Supreme Court intend to sanction the retention of money, goods, services or benefits so long as the insured, customer or client does not realize that he is entitled to same? Would such a requirement of good faith or honesty result in the "dismantling of the insurance industry"? (Justice Flaherty's dissent in *Dercoli*). Are not insurance companies in business to pay benefits?

The Majority on numerous occasions draws significance from its own conclusion that the insured only had "potential claims"[1] for post mortem work loss benefits [11] where, in reality, there is no doubt that *in 1980, and for the next four years until the statute of limitations expired,* Mrs. Miller had a *real* claim.

Repeating the word "potential" as the Majority does cannot change the fact that Mrs. Miller was entitled to

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[1] *See,* Slip Op. p. 3 ("potential entitlements" and "possible wage loss benefits"); p. 3 n.2 ("possible benefits for lost wages); p. 5 ("potential claims," "potentially entitled," and "knowledge of the possibility"), p. 6 ("potential claims"), p. 10 ("any or all available benefits"); p. 11 ("potentially entitled").

work loss benefits *and only the statute of limitations precludes her from recovering same.* The statute of limitations was intended to protect defendants who are not aware that they did something wrong or might be called upon to defend themselves for something that happened years before of which they had no notice. The statute of limitations was not intended to protect a carrier that knew it had a responsibility to provide benefits for premiums received and who, instead, perpetrated a fraud upon its insured.

E. The three-justice Majority in the instant case misapprehended the legal distinction between the duty owed by a third party carrier or one's employer and the duty that an insurer owes to its own insured.

There has always been a distinction between the duty that an insurance carrier owes to its own insured and the absence of any duty to third parties. Prior to the passage of the No-Fault Law, when an individual was injured or killed in a motor vehicle accident, it was generally the tortfeasor or third party carrier that had the responsibility to pay medical bills, property damage, funeral bills, and lost wages. There was no question that such a carrier was an adversary, and there was a need to hire one's own attorney to represent oneself. [12]

The No-Fault Act, however, changed the situation so that an insured went to and recovered substantial benefits from his own insurance carrier, was told that he did not need a lawyer in dealing with his own carrier, and that his own insurance company would provide any and all benefits to which the insured was entitled.

The three-justice Majority, by relying upon *Taglianetti v. Workmen's Compensation App. Bd.*, 503 Pa. 270,

469 A.2d 548 (1983) misapprehends that the relationship between an insured and insurer is vastly different than that between employee and employer.

In *Taglianetti,* an unidentified female in the personnel office of the University of Pennsylvania Hospital misinformed the surviving widow of a deceased employee that, apart from life insurance and the death gratuity, she had no othe widow's benefits. *Taglianetti,* 469 A.2d at 549-550. The information turned out to be incorrect because the surviving widow was entitled to Workers' Compensation death benefits under 77 P.S. §602. *Taglianetti,* 469 A.2d at 549. Your Court in *Taglianetti,* citing exclusively Workers' Compensation cases and statutes, concluded that because there was no evidence that the unidentified female in the personnel office "intentionally deceived" the surviving widow and because the surviving widow's attorney conceded that an employer has no affirmative duty to provide information of possible benefits, it would not "impose a duty upon an *employer* where none exists." *Taglianetti,* 469 A.2d at 550. [13]

The present case is not a Workers' Compensation case, an employment case, nor any other third party insurance or relationship type case. It is a no fault/first party case and, under such cases, an insurance carrier has a fiduciary duty to its insured.

F. The holding in this case not only is contrary to Your Court's prior holdings as to first party insurance law, but also will have far-reaching application in many other insurance cases with catastrophic results.

Although the legislature repealed the No-Fault Law, it adopted in 1984 and amended in 1990, the Motor Vehicle Financial Responsibility Law, 75 P.S. §1701, et *seq.*, (MVRFL). The MVFRL continues to require a close relationship between an insured and insurer in obtaining first party benefits which include medical expenses, wage losses, funeral expense, death benefits, and uninsured and underinsured motorist coverage. The legislature requires that insurance carriers provide their insureds with Section 1791 "important notices" to advise their insureds as to their potential rights to purchase coverage. Insurance carriers must explain coverages and obtain signatures and dates to specific forms to select limited tort, reject ininsured/underinsured coverage or stacking of same. *See, e.g.*, Section 1731, 1738. *Also see,* Section 1734 requiring a written waiver, particularly under the 1984 law. Surely, the three-justice decision in this case flies in the face of such legislation. [14]

The Superior Court recently decided *Banker v. Valley Forge Ins. Co.*, 401 Pa. Super. 367, 585 A.2d 504 (1991), *alloc.denied,* 529 Pa. 615, 600 A.2d 532 (1991), that emphasizes the duty of an insurance company to deal with an insured fairly and in good faith, which *includes the duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies.*

The decision of the three-member Majority in this case gives a clear signal to insurers that they should merely

accept claims information, pay some *nominal* amount, and sit back and wait for the statute of limitations to run. Unsophisticated consumers will, like Mrs. Miller, assume they have received all to which they are entitled. Others will hire attorneys to litigate their claims; clogging out already over-crowded court system. The effects will be felt in all areas of insurance – life, health, homeowners, fire and theft, and automobile. What the Majority does in *this case* is give a license to insurers to ignore insurance statutes and contractual obligations in favor of higher profits for insurance companies and illusory coverage for everyone. Reargument before the *full* court is essential to correct this outrageous decision that may affect every man, woman and child in Pennsylvania.

IV. CONCLUSION [15]

In *1980,* Keystone received premiums from the Millers and, in return, promised to pay the no-fault benefits to which they were entitled. Your Court unanimously decided *Heffner* and *Pontius,* holding that dependent survivors were entitled to receive post mortem work loss benefits. Mr. Miller died and Mrs. Miller was determined to be a dependent survivor. She filed a claim form that said Keystone would pay the no fault benefits to which she was entitled. Knowing from *Heffner, Pontius* and *Nye* that Mrs. Miller was entitled to post mortem work loss benefits, Keystone chose as its corporate policy *not* to pay same unless specifically requested and *not* to tell insureds of their eneitltment. Keystone closed its file, waited four years and claimed the statute of limitations as a defense. That is out and out fraud in

addition to the breach of its statutorily mandated duty. Your Court cannot sanction such conduct and should grant reargument.

Respectfully submitted,

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Dated: February 10, 1994

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
NO. 84 M.D. APPEAL DOCKET, 1991

MARY C. MILLER, Administratrix of
the Estate of JOHN R. MILLER, Deceased
and all others similarly situated,

Appellees

v.

KEYSTONE INSURANCE COMPANY,

Appellant

PROOF OF SERVICE

I hereby certify that on this 10th day of February, 1994, a true and correct copy of the foregoing PETITION FOR REARGUMENT was served upon the following persons and in the manner indicated below which services satisfies the requirements of Pa. R.A.P. 121:

Service by First Class United States Mail,
postage prepaid:

A. Richard Feldman, Esquire
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